IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 671 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JETHALAL JIVABHAI PANDYA

Versus

STATE OF GUJARAT

Appearance:

MR AM RAVAL for Petitioner

MS HARSHA DEVANI, AGP for Respondents No. 1-4

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 18/10/2002

ORAL JUDGEMENT

1. This petition is filed under Article 226 of the Constitution of India for quashing and setting aside the order dated 17th January, 1992 placed along with the petition at Annexure-D and to reinstate the petitioner

with all consequential benefits. It was also prayed that the petitioner be provided lighter duty which he was performing earlier. The petition has arisen on the following backdrop.

2. The petitioner was serving as a First Grade Head Constable in State Reserve Police Force Group No.13, Rajkot, however, we are not able to ascertain the date of his recruitment as such. But, in 1985, the petitioner suffered a heart attack and till then he had put the service of many years. In 1985 on account of heart attack, the petitioner remained on leave for six months and resumed his duties and discharged duties upto 1989. Not only that he was promoted to First Grade Head Constable on 1st of June, 1989. However, in the year 1989 after the promotion, the petitioner requested the respondents No. 1 to 3 for lighter duty because he had suffered a heart attack in the year 1985. On receiving the request of the petitioner in 1989, he was sent to the Medical Board by respondents No. 2 and 3 on 22nd September, 1989. The decision of the Medical Board after examining the petitioner was however not communicated to the petitioner but he must have been declared unfit because on 30.10.1990 he was served with the order that w.e.f. 31st October, 1990 on the ground of physical incapacity he was directed to be compulsorily retired. Against this order of compulsory retirement, petitioner preferred Department Appeal before respondent No.3. The Appeal was decided by Commandant, Group No.13, Rajkot on 14th December, 1990. The operative part of the order dated 14th December, 1990 is placed on record at Annexure-B. Accordingly, though the petitioner was declared unfit medically, the appellate authority thought it expedient to reinstate the petitioner and earlier order dated 30.10.1990 of compulsory retirement of the petitioner was suspended. It was further directed by the appellate authority in the said order dated 14.12.1990 at Annexure-B that the petitioner shall appear before the Medical Appeal Board for the physical fitness. It is pertinent to take note of provision of Rule 202-A of the Bombay Civil Services Rules, 1959 which makes provision to the extent that if a competent authority comes to the conclusion on the reports of a Medical Officer or any of the Standing Medical Board that a Government servant should be retired on invalid pension, it shall inform the Government servant that he has been declared to be completely and permanently incapacitated for further service and that it is proposed to declare him invalid. On the strength of this provision, vide order dated 30.10.1990 the petitioner was retired compulsorily. It is further pertinent to note here that sub-rule (2)of

Rule 202-A provides for Appeal before a Board against a medical report by which the competent authority might be taking a decision to retire a Government servant on invalid pension. For this, the Government is also required to inform the concerned employee that if concerned employee so desires, he may be examined by Medical Appeal Board within one month from the date the concerned employee is so informed by the Government. Of course, the provision is also there that the request of the Government servant for examination by the Medical Appeal Board must be supported by prima facie evidence that good ground for an Appeal exists and it must accompany a treasury receipt for Rs.48 for the cost of Medical Appeal Board. It is also made clear that the right of Appeal cannot be claimed as of right but on an application, due consideration will be given to such request. There was further provision in Rule 202-A of the Bombay Civil Services Rules, 1959 to the effect that "except where it is clear that a Government servant himself desires to be invalidated or where it is obvious from the nature of the disability that no useful purpose will be served by an appeal", in such circumstances, the Government was absolved from the duty to inform the Government servant that he was completely and permanently incapacitated for further service and regarding the provision of the Appeal. The above said portion in the provisions of Rule 202-A of the Bombay Civil Services Rules, 1959, which absolve the Government in certain circumstances from the duty to inform the concerned Government servant was held ultra vires by the decision of this Court in the matter of RAMSING NENASING RAO vs. STATE OF GUJARAT, reported in 1987 (2) GLR 1137. It appears that after deciding his Appeal on 14th December, 1990, the petitioner was reinstated from 1.1.1991. The petitioner worked upto 31.1.1992 and thereafter again by an order dated 17.1.1992 the petitioner was compulsorily retired from 31.1.1992. In the said order dated 17.1.1992 which is placed at Annexure-D, respondent No.3 Commandant of Group No.13 informed the petitioner that the petitioner was required to appear before the Medical Appeal Board as per the provisions of Rule 202-A but since there was no such Medical Appeal Board constituted in the State of Gujarat, as per the earlier order dated 30.10.1990, whereby the petitioner was declared unfit by the Medical Board, Jamnagar, the petitioner was directed to be compulsorily retired from 31st January,1992. Against which, this petition is filed.

3. Learned Advocate Mr. A.M. Raval for the petitioner and learned AGP Ms. Harsha Devani for the respondents were heard at length.

4. Considering the rival contentions and going through the record, the crux of the matter appears to be applying the principle of natural justice, more particularly, an opportunity of being heard especially in the case of a Government servant, against whom, an adverse and serious order of compulsory retirement which otherwise is a major penalty, is passed. Undoubtedly, it is absolutely within the domain of the authority of the Government to retire an employee on invalid pension when he is found permanently incapacitated to fulfil and discharge his given duties. Such adverse orders cannot be passed without being given an opportunity of hearing to the concerned employee. The facts of the case clearly suggests that the action of the respondents were taken under the provision of Rule 202-A of the Bombay Civil Services Rules, 1959 applicable to the present petitioner. The provision, as noted above, empowers the Government to retire an employee on invalid pension when such employee is found completely and permanently incapacitated for further service. At the same time, pious duties are also cast upon the Government to stick to the principle of natural justice. The Government servant will be informed in such cases by the Government that concerned Government servant was declared to be completely and permanently incapacitated for further service. A duty is also cast on the Government to inform further that the Government servant may choose a forum - Medical Appeal Board for his further examination if he so desires and for that the Government servant is permitted to submit himself to the said authority within one month. The provision therefore clearly indicates that if the Government servant is proposed to be compulsorily retire on his being declared to be completely and permanently incapacitated for the further service, Government is bound to inform the concerned employee about the proper action to be taken and further about the appeal which can be filed to the Medical Appeal Board. These provisions are made undoubtedly to afford an opportunity to the concerned Government servant to make proper representation to the Government as well as to choose the forum of Medical Appeal Board. In either case, as noted above, the Government servant must be informed about his status of fitness or otherwise for the further service. This can be done only if the concerned Government servant is served with the opinion of the Medical Officer or any of the Standing Medical Board, as the case may be. True it is that though as provided in Rule 202-A, the Government is not duty bound to inform the Government servant of the reasons which led the Medical Officer or Standing Medical Board to recommend his invalidity. This

action is necessarily suggests that the Government servant is entitled to be informed about the conclusions of Medical Officer or Standing Medical Board, as the case may be.

5. Again reverting to the facts of the case, the Medical Board of Irwin Hospital at Jamnagar took a decision in the year 1989 that the petitioner was incapacitated for further service. However, this could be read from the Order at Annexure-A dated 30.10.1990. It appears that the conclusion of the Medical Board of Irwin Hospital at Jamnagar was not communicated to the petitioner. Therefore, on filing a Departmental Appeal, he was reinstated from 1st of January, 1991 vide order of appellate authority dated 14.12.1990. There again, though the petitioner was informed that he was required to appear before the Medical Appeal Board but the report of the Medical Board was not communicated to the petitioner. On the strength of this reinstatement order the petitioner worked upto 31.1.1992. The petitioner could not appear before the Medical Appeal Board because no such Board was constituted as envisaged by the provision of Rule 202-A of the Bombay Civil Services Rule, 1949. Therefore, he was again compulsorily retired from 31.1.1992 vide order dated 17.1.1992 at Annexure-D, relying upon the earlier examination by the Medical Board, Jamnagar, declaring the petitioner to be unfit for the further service and further the concerned authority in the said order relied upon a fact that since the Medical Appeal Board as envisaged under the provision of Rule 202-A of the Bombay Civil Services Rules, 1959 was not constituted in the State of Gujarat, the opinion of the Medical Board, Jamnagar was relied and the petitioner faced compulsory retirement.

6. The above scrutiny amply discloses that the petitioner was never informed about the proposed action of the compulsorily retiring the petitioner before he was actually made to retire on invalid pension. Shockingly, the second reason that the respondents to take decision to retire the petitioner on invalid pension was that there was no constitution of Medical Appeal Board in the State of Gujarat. This disclosure leads to inevitable conclusion that the petitioner was deprived of the opportunity of being heard and to be examined by the Medical Appeal Board. It was incumbent on the respondents to communicate the report of the Medical Board, Jamnagar, to the petitioner declaring him unfit. Though, as said above, it is never incumbent on the respondents to communicate the reasons of the Medical Board on which the Board might have arrived at the

conclusion. The provision makes it clear that the concerned Government before taking action of retiring a Government servant on invalid pension, he will be informed about the proposed action to be taken and undoubtedly provision is made to enable the concerned Government servant to make proper representation and to have an opportunity of being heard on this aspect. This is so because compulsory retirement on invalid pension, is otherwise a major penalty. Nothing is produced on record to show that what was the actual conclusion of the Medical Board to declare the petitioner completely and permanently incapacitated for the further service or what was the nature of conclusions arrived by the Medical Board, Jamnagar. It is also pertinent to note that under the provisions of Rule 202-A, the respondents can take the action against the concerned employee after informing him as above only, if he is declared to be completely and permanently incapacitated for the further service. Physical unfitness may be varied from lesser degree to complete incapacity. Except in case of complete incapacity, law is now established that the employer shall endeavour to absorb such employee in some other lighter work where circumstances and relevant provisions so permit except to get rid of an employee by measures of compulsory retirement and, therefore, it is made necessary for the respondents in case of completely and permanently incapacitated employees and so declared by the competent Medical Officer, to inform the employee about the proposed action, which can be taken by the employer. It appears that in this case, there is complete violation of mandatory provisions which protect the principles of natural justice. Petitioner first in 1989 was retired straightaway without informing him as envisaged by Rule 202-A so as to deprive him of his right of making representation and to have an opportunity of being heard. The order at Annexure-D dated 17.1.1992 of the Respondent No.3 directing the retirement of the petitioner on invalid pension suffers from this serious vice and requires to be quashed on this ground.

7. The order at Annexure-D dated 17.1.1992 suffers from further vice that the petitioner was compulsorily retired on further ground that the petitioner was required to appear before the Medical Appeal Board, but there was no constitution of such Medical Appeal Board in the State of Gujarat, it would be a great injustice to the petitioner to retire him compulsorily on this ground.

8. In view of the above discussion, the petition is allowed. The order dated 17.1.1992 at Annexure-D of respondent No.3 retiring the petitioner compulsorily on

invalid pension, right from 31.1.1992 is quashed and set aside. The respondents are directed to treat the petitioner on duty for all purpose till the date of his superannuation with all consequential benefits as if, the order Annexure-D dated 17.1.1992 was never existed except the respondents are required to take disciplinary action against the petitioner on any other ground than mentioned in this petition. Rule is made absolute with no order as to costs.

9. It is hoped that the petitioner will be paid back wages if not paid by the respondents within three months from the date of the receipt of the certified copy of this order by the respondents.

(J.R. Vora, J.)

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